

## SPECIAL COUNCIL MEETING

JULY 18, 2012

The Special Meeting of the Council of the County of Kaua'i, was called to order by the Council Chair at the Council Chambers, 4396 Rice Street, Suite 201, Lihu'e, Kaua'i, on Wednesday, July 18, 2012 at 8:37 a.m., after which the following members answered the call of the roll:

Honorable Tim Bynum (*present 8:39 a.m.*)  
Honorable Dickie Chang (*present 8:38 a.m.*)  
Honorable KipuKai Kuali'i  
Honorable Nadine K. Nakamura  
Honorable Mel Rapozo  
Honorable JoAnn A. Yukimura  
Honorable Jay Furfaro

### APPROVAL OF AGENDA.

Ms. Yukimura moved for approval of the agenda as circulated, seconded by Mr. Kuali'i, and unanimously carried.

Chair Furfaro: I want to point out that item C 2012-218 is for open session and we will come back to that. I would like to say right now, if there is anyone in the audience that would like to testify on the Executive Sessions as posted, this is the time to do it before we vote to go into Executive Session. Is there anyone in the audience that wishes to speak on any of these items? Ken, come right on up.

KEN TAYLOR: Chair, members of the Council, my name is Ken Taylor. I want to speak on C 2012-218. I am very disturbed that under the circumstances that County Council and the Mayor would be asking for additional funds to hire outside counsel. I think that the Mayor and County Attorney was out of line in moving forward with the advice and the action that took place this past year with the discipline of the Chief of Police. I strongly believe that the Charter gives that authority to the Police Commission. I have heard that from a number of attorneys, as well as my own reading of the Charter. I do not believe that when the Charter gives the Police Commission the power to hire and fire the Police Chief that – although it is rather silent on discipline, but you would not hire somebody and fire them without discipline before firing them. I just do not think it is proper to appropriate ten thousand dollars (\$10,000.00) to hire outside counsel. I think the County Attorney has issued the information that apparently the Mayor followed and so I believe strongly that the Mayor should be represented by the County Counsel with no outside hiring of outside counsel, especially at the tune of ten thousand dollars (\$10,000.00) to the rate payers. That is absurd. I cannot believe that they are even sitting here considering asking for this kind of money and I do not think that you folks should under any circumstance allow them the ten thousand (10,000) that they are asking for. Let the County Attorney represent the Mayor. If the Mayor so chooses to take money out of his pocket and hire outside counsel, so be it. It should not fall on the tax payers to take care of this issue. Thank you.

Chair Furfaro: Thank you.

Ms. Yukimura: Ken, when you say County Council, you mean "c,o,u,n,s,e,l," you mean the County Attorney, right?

Mr. Taylor: County Attorney.

Ms. Yukimura: Because people hearing it will think you are meaning "us" and I do not think we want to represent the Mayor in Court.

Mr. Taylor: Thank you for clarifying that.

Ms. Yukimura: Thank you.

Chair Furfaro: Any other questions of Ken? If not, thank you very much, Ken.

GLENN MICKENS: Thank you, Jay. For the record, Glenn Mickens. As you know, I have two (2) testimonies here – one for me and one for Charlie Iona. Can I read them in order, Jay?

Chair Furfaro: What is the order?

Mr. Mickens: I would read mine first and then I will go ahead and read Charlie's.

Chair Furfaro: I want to make sure you understand that it is not the practice of this Council to allow testimony from others to be read, but I as the Administrator of the Council, as Chair, will allow you solely and I want to make note because Mr. Iona is a Commissioner. I will allow it but I will not allow any questions on his testimony. You can read yours first followed by his.

Mr. Mickens: I hope that the dedicated members of our Police Commission are as upset with the two (2) to four (4) vote of the Council at the meeting last Wednesday as were Councilmembers Rapozo and Kualii'i, and many members of the public, to not allow an amendment to our Charter to be put on the ballot to allow the voters to decide if they, the Police Commissioners, should have the authority to not only hire and fire the Chief, but to also be able to discipline him was very wrong.

Councilwoman Yukimura's statement that, "if the voters approve the Charter amendment, it would create chaos in the County, as Boards and Commissions are made up of voluntary lay people who meet intermittently."

For me, this statement could not be farther from the truth in two (2) respects. It insinuates that these Commissioners as voluntary lay people are not capable of making meaningful decisions. As Mel so factually pointed out, these Commissioners were appointed by the Mayor and were interviewed and approved by every Councilmember, including Vice Chair Yukimura, so certainly have the ability to make the hard decisions that elected, paid employees make. It insinuates that the voters, those who put elected officials in office, would make a chaotic mess of our County by voting for this amendment – a real insult to the people's intelligence.

As KipuKai said, this resolution clearly came about because of the question of disciplinary authority over the Police Chief. As he, Mel, the Commissioners, and many members from the public agree, the Commission not only has the authority

under our Charter to hire and fire the Chief, but they should also have supervisory and disciplinary duties, duties that many legal minds have already interpreted the Charter as saying. A pending lawsuit is expected to confirm this result. If it does not then a Charter amendment may be appropriate. I do not know how that is going to come out. That is my testimony. Now if I may, I will read...

Chair Furfaro: Before you go, I want to clarify a couple points.

Mr. Mickens: Yes.

Chair Furfaro: First of all, it is not any comment of mine but the perception did an insult to the citizens is kind of mire a little bit because I think the other part of the piece that was talked about at the table, this Council allocated money to the Police Commission for the purpose of going through the Court process first for that interpretation. I think that is the piece that perhaps we are missing here. It was this Council in particular, I was the one that introduced that money bill and the Council supported, let that interpretation be done by the Courts first, before we tamper with the Charter.

Mr. Mickens: True.

Chair Furfaro: True, that is all I wanted to hear. You can give your other testimony now.

Mr. Mickens: Aloha and good morning, Chair Furfaro and Councilmembers. For the record, my name is Charles Iona. I have asked Mr. Glenn Mickens to read my testimony to all of you and I am sorry I could not be at this meeting personally because of prior scheduling commitments. The views expressed is solely of myself and no one else. I am providing you with this testimony with regards to subject matter C 2012-218 which is to be received and or heard on Wednesday, July 18, 2012. This request by the County Attorney is asking to expend funds in the amount of ten thousand dollars (\$10,000.00)...

ALFRED B. CASTILLO, County Attorney: Excuse me, Council Chair.

Chair Furfaro: Excuse me, one moment. Yes, Mr. Castillo.

Mr. Castillo: For the record, Al Castillo, County Attorney. The Council Chair stated in the beginning that this written testimony, in lieu of a personal appearance by Charles Iona, was being permitted because he is a Commission member. What Mr. Mickens just read was that he is not appearing as a Commission member, he is appearing as a citizen. Therefore, based on what you just said, I think it would be improper for Mr. Mickens to read this testimony.

Chair Furfaro: Thank you. Glenn, before you proceed, let me consult here with our group. Is there anyone that would not like this testimony be continued to be read? If not, I want to make sure I was talking about policy and procedure and the extra courtesy given to him, but at the same respect, I want to make sure that this is not a precedent that we are setting that everybody can come in and read testimony. I will let you continue, there will be no questions afterwards, everyone has an opportunity to speak to the Council, but there was a moment of caution there, I have heard it and there are no objections from the Council. You can continue.

Mr. Mickens: Thank you, Jay. This testimony is centered around one (1) question and that is, is there a conflict between the Mayor and the County Attorney's Office? If this question can be answered that a conflict does exist then I would support this legislative body if it so chooses to grant the request of expending ten thousand dollars (\$10,000.00) to retain Special Counsel for the Mayor.

I came before this legislative body and gave testimony as to the conflict which presented itself by the County Attorney's Office who represents the Police Commission. The Police Commission felt that a conflict existed because the County Attorney's Office rendered an opinion surrounding the powers of the Mayor and authority over the Police Chief by the Mayor and because of this the County Attorney's Office could not properly represent the Police Commission. The Police Commission believes, as the appointing authority, that hiring and/or removal of the Police Chief and everything else in between is left with the appointing authority which includes discipline. This is what I believe was the whole contention of the matter, and this legislative body voted to expend funds in the amount of ten thousand dollars (\$10,000.00) for Special Counsel to represent the Police Commission in a declaratory judgment or ruling hearing before the Fifth Circuit Court.

The advice given by the County Attorney to the Mayor during the period of time leaves this second point - is the County Attorney not confident of such advice that was previously given to the Mayor? I think the County Attorney's Office should be representing the Mayor because it was they who boldly stood by with their position.

Now again, if there are some legal issues which would prevent the County Attorney's Office from representing the Mayor, then I say "yes, to providing such funds for Special Counsel." But to wait to this point seems a little late in the game knowing that the Police Commission retained a law firm to represent its interest as mentioned above. Thank you, Charles C.C. Iona.

I just want to say that I completely agree with what Mr. Iona has said here. I support his position completely. Whether as a Commissioner or a citizen, as Al was saying, I completely support what he said.

Chair Furfaro: Okay, Glenn, thank you. I just want to point out, I mentioned earlier that this body did approve money for the Police Commission. I do want to say that later in today's Bill 2438, which was introduced by myself, is to give us clarity going forward as we begin going through the public hearings, first and second reading. That will probably or at least I am going to request that it be deferred today as we are moving forward. I also want to say without disclosing any confidential information at this time before we have our Executive Session, we are attempting to do the right thing for the right reason here and we want to get everything appropriately interpreted. On that note, if you can again understand that we are seeking to set some parameters. That is all I will say at this point.

Mr. Mickens: Again, I just want to say that I think Mr. Iona's point is well, well taken in what he is saying. I think he has a very valid point.

Chair Furfaro: I do not disagree with his point. The reality is that this Council made money available to get an interpretation from the Court.

Mr. Mickens: Right.

Chair Furfaro: I can tell you that is where we are at, and for other confidential matters at the moment, I do not think I can disclose any other information on advice that this Council has received.

Mr. Mickens: I do not...

Chair Furfaro: I did not pose a question.

Mr. Mickens: Okay.

Chair Furfaro: I just answered your question. Thank you, Glenn. Is there anyone else in the audience that wants to testify before I call for a vote going into Executive Session? County Attorney, can you summarize all of the items for us in your presentation?

There being no objections, the rules were suspended.

MARC GUYOT, Deputy County Attorney: Good morning, Chair Furfaro, Vice Chair Yukimura, Councilmembers, Deputy County Attorney, Marc Guyot. Pursuant to Haw. Rev. Stat. ("H.R.S.") §92-7(a), the Council may, when deemed necessary, hold an executive session on any agenda item without written public notice if the executive session was not anticipated in advance. Any such executive session shall be held pursuant to H.R.S. §92-4 and shall be limited to those items described in H.R.S. §92-5(a). Confidential reports on file in the County Attorney's Office and/or the County Clerk's Office. Discussions held in Executive Session are closed to the public.

#### EXECUTIVE SESSION:

ES-553 Pursuant to HRS sections 92-4, 92-5(a)(4), and Kaua'i County Charter section 3.07(e), the Office of the County Attorney, on behalf of the Council, requests an executive session with the Council to provide the Council with a briefing regarding the claim against the County by Kaua'i Akinaka & Associates, Ltd, filed on May 14, 2012, and previously on the Council's agenda as C 2012-189, and related matters. The briefing and consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Council and the County as they relate to this agenda item.

ES-554 Pursuant to HRS sections 92-4, 92-5(a)(4), and Kaua'i County Charter section 3.07(e), the Office of the County Attorney, on behalf of the Council, requests an executive session with the Council to provide the Council with a briefing regarding the claim against the County by Waste Management of Hawai'i, filed on May 17, 2012, and previously on the Council's agenda as C 2012-191, and related matters. The briefing and consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Council and the County as they relate to this agenda item.

ES-555 Pursuant to HRS sections 92-4, 92-5(a)(4), and Kaua'i County Charter section 3.07(e), the Office of the County Attorney, on behalf of the Council, requests an executive session with the Council to provide the Council with a briefing regarding the claim against the County by Waste Management of Hawai'i, filed on May 24, 2012, and previously on the Council's agenda as C 2012-192, and related matters. The briefing and consultation involves consideration of the powers,

duties, privileges, immunities, and/or liabilities of the Council and the County as they relate to this agenda item.

ES-561 Pursuant to Haw. Rev. Stat. sections 92-4 and 92-5(a)(4), and Kaua'i County Charter section 3.07(E), the Office of the County Attorney requests an executive session with the Council, to provide the Council with a briefing and to request authority for a possible settlement proposal in Jane Doe vs. County of Kaua'i, EEOC Charge No. 541-2010-01873 and related matters. This briefing and consultation involves consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

ES-562 Pursuant to HRS sections 92-4, 92-5(a)(4), and section 3.07(e) of the Kaua'i County Charter, the Office of the County Attorney requests an executive session with the Council to provide the Council with a briefing on the retention of special counsel to represent Mayor Bernard P. Carvalho, Jr., in Kaua'i Police Commission, et al. vs. Bernard P. Carvalho, Jr., in his official capacity as the Mayor of the County of Kaua'i, Civil No. 12-1-0229 (Fifth Circuit Court), and related matters. The briefing and consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Council and the County as they relate to this agenda item.

There being no objections, the meeting was called back to order, and proceeded as follows:

Chair Furfaro: Members, before I call for a vote, I want to make sure we understand that it is my intent to handle ES-553, 554, 555 first because it will involve having people away from their offices to make themselves present for questions from the Council. We will follow that order. Is there anymore discussion before I call for a vote?

Ms. Yukimura: Mr. Chair, I would like to make some comments about the testimony that was made. I want to say that the resolution or the Charter amendment that was proposed to give management responsibilities to all the Commissions and Boards that appoint Department Heads was far broader than just affecting the Police Chief and the Police Commission. This applied to all Boards and Commissions that appoint managers. Essentially, what you are doing is you are saying at least half of the Mayor's cabinet is no longer accountable to him but is accountable to a group of lay people who meet very infrequently. It is not questioning the competence of these Boards in terms of the duties that they are presently assigned to do, but we are talking about giving them far more responsibility in a management format that shifts accountability. A day-to-day management by a lay Board that meets infrequently makes no sense to me and would result in chaos. If the resolution had been more targeted, that is a whole other way of addressing the issue of Police Commission and Police Chief. The resolution that was before us applied to every Board and Commission that appoints a Department Head, and the ramifications are huge, and I believe would be negative to proper governance in the County.

Ms. Yukimura moved to convene in executive session for ES-553, ES-554, ES-555, ES-561, and ES-562, seconded by Mr. Chang, and carried by the following vote:

FOR CONVENING IN EXECUTIVE SESSION: Bynum, Chang, Kuali'i, Nakamura, Rapozo, Yukimura, Furfaro	TOTAL – 7,
AGAINST CONVENING IN EXECUTIVE SESSION: None	TOTAL – 0,
EXCUSED & NOT VOTING: None	TOTAL – 0.

There being no objections, the Council recessed at 9:01 a.m.

The Council reconvened at 12:29 p.m., and proceeded as follows:

COMMUNICATION:

C 2012-218 Request from the Office of the County Attorney for authorization to expend funds up to \$10,000.00 to retain special counsel to represent Mayor Bernard P. Carvalho, Jr., in Kaua'i Police Commission, et al. vs. Bernard P. Carvalho, Jr., in his official capacity as the Mayor of the County of Kaua'i, Civil No. 12-1-0229 (Fifth Circuit Court), and related matters. In support of this request, this office states as follows:

- Special Counsel will be hired pursuant to the normal selection process.

Mr. Bynum moved to approve C 2012-218, seconded by Ms. Nakamura.

Chair Furfaro: Discussion?

Ms. Yukimura moved for a recess, seconded by Mr. Kuali'i, and unanimously carried.

There being no objections, the Council recessed at 12:30 p.m.

The Council reconvened at 4:31 p.m., and proceeded as follows:

Chair Furfaro: I just want to let you know that I do plan to support this as I had a previous conversation with the County Attorney that dealt with ODC making a recommendation that this does occur. I will be supporting this accordingly.

Ms. Yukimura: Could we suspend the rules and have the County Attorney up?

Chair Furfaro: Certainly.

There being no objections, the rules were suspended.

Mr. Castillo: Council Chair, Councilmembers, good afternoon, Al Castillo, County Attorney.

Chair Furfaro: Vice Chair, you have the floor.

Ms. Yukimura: It is my understanding that this request is being made because basically the County Attorney's Office has been basically disqualified from participating as Counsel through a Disciplinary Counsel advisory opinion?

Mr. Castillo: Let me clarify that.

Ms. Yukimura: Okay.

Mr. Castillo: And without going into what we have discussed in Executive Session. In every matter that we handle and especially in this case, with all of the various clients that are involved, the regulatory agency for attorneys is the Office of Disciplinary Counsel. Where you would get your advisory opinion from Ethics, we would get our advisory opinion from the Office of Disciplinary Counsel.

Ms. Yukimura: "We" meaning lawyers?

Mr. Castillo: Yes. In this case and with all of the specifics and what has gone on since February until now, I found it incumbent upon myself to contact the Office of Disciplinary Counsel and report to them the chronology of events, and I did receive guidance from them that the entire Office of the County Attorney would be disqualified. That is in essence the reason why we have come to the Council asking for Special Counsel.

Ms. Yukimura: To go against the advisory opinion of the Disciplinary Counsel would have dire consequences for any attorney, as I understand it?

Mr. Castillo: Yes, dire consequences. We have our licenses to protect and that is the reason why we have the Office of Disciplinary Counsel to obtain guidance from them. It is unfortunate that they do not give written opinions; the way they have it set up is you make your presentation and they give you an advisory opinion.

Ms. Yukimura: That leaves the Mayor without legal representation in the Court case?

Mr. Castillo: That would essentially, yes... that would essentially leave the Mayor in his official capacity without Counsel.

Ms. Yukimura: So that is the reason for the request for Special Counsel?

Mr. Castillo: Yes.

Ms. Yukimura: Alright, thank you.

Chair Furfaro: Mr. Rapozo.

Mr. Rapozo: Al, the summons has an "answer date?"

Mr. Castillo: Yes.

Mr. Rapozo: When do you anticipate, should it be approved, when do you anticipate the Special Counsel coming onboard?

Mr. Castillo: As soon as possible, but it is my understanding that we have twenty (20) days to answer the complaint. It is common practice in terms



of civility amongst attorneys that we will be requesting a continuance on the twenty (20) days. I have been given some sort of courtesy by the plaintiff that they will be civil in this and honor such a request.

Mr. Rapozo: But what is your best estimate as to when the Special Counsel would be in place?

Mr. Castillo: Provided that we go through even the procurement process?

Mr. Rapozo: Yes.

Mr. Castillo: I would say...

Mr. Rapozo: You have a list, right?

Mr. Castillo: We have a list and provided we get the authorization today – maybe within a month, no longer than that.

Mr. Rapozo: No longer than a month?

Mr. Castillo: Yes.

Mr. Rapozo: Okay, thank you.

There being no objections, the meeting was called back to order.

Chair Furfaro: As you know, I have extended my time to be here for the vote. I would like to ask to call for the vote as my comments here with the County Attorney are based on him getting recommendations from the Office of Disciplinary Counsel and so let us do a roll call vote.

The motion to approve C 2012-218 was then put, and carried by the following vote:

FOR APPROVAL:	Bynum, Chang, Kualii, Nakamura, Rapozo	TOTAL – 7,
	Yukimura, Furfaro	TOTAL – 0,
AGAINST APPROVAL:	None	TOTAL – 0.
EXCUSED & NOT VOTING:	None	

#### ADJOURNMENT.

There being no further business, the meeting was adjourned at 4:38 p.m.

Respectfully submitted,



RICKY WATANABE  
County Clerk

/ds

